A FEW U.S. SUPREME COURT AND U.S. COURT OF APPEALS DECISIONS FOR TAXPAYERS

UNITED STATES v SULLIVAN, 274 U.S. 259; The Fifth Amendment applies to every means by which one may be compelled to produce information which may incriminate.

HALE v HENKEL, 201 U.S. 43; A corporation has no right to refuse to produce its books and papers for examination, but an individual may stand upon his constitutional rights as a citizen. . . An individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute.

HELIGMAN v UNITED STATES, 407 F2d 448; The Fifth Amendment must be specifically claimed. . .

UNITED STATES v DICKERSON, 413 F2d 1111, Only the rare taxpayer would be likely to know that he could refuse to produce his records to IRS agents.

MARCHETTI v UNITED STATES, 390 U.S. 39; No act of Congress can do away with the Fifth Amendment right against self-incrimination.

UNITED STATES v DALY, 481 F2d 28; One cannot make a blanket refusal to answer any questions on the returns relating to income.

NOTE: The Citation (the number following the name of the case) refers to (1) the number of the volume containing the writeup of the case, (2) the Court that decided it, and (3) the page the decision begins on.

For example: United States v Sullivan, 274 U.S. 259 is the case decided on appeal to the Supreme Court of the United States found in the 274th volume of the U.S. Supreme Court Reports (the official reports of the Supreme Court) beginning on page 259. If other page numbers are given it is an indication that quoted material is found on later pages.

F2d is the abbreviation for the "Federal Second" set of reports for the U.S. Court of Appeals, the courts one step below the U.S. Supreme Court.

Published by: The Arizona Caucus Club, P.O. Box 60, Mesa, AZ 85201

Constitution provides protection

Court strikes down surprise inspections

WASHINGTON (AP) — The Supreme Court, voting 5-3, ruled today that the federal government may not make unannounced inspections of the nation's workplaces unless it first obtains a search warrant.

The court struck down as unconstitutional a portion of the Occupational Safety and Health Act that has allowed Labor Department inspectors to carry out some 400,000 spot checks of factories and other business places since 1971.

The Constitution's protection against unreasonable searches applies to commercial premises as well as homes, the court said in an opinion written by Justice Byron R. White.

Today's decision upheld a 1976 ruling by a three-judge federal court in Idaho that government inspectors must first prove to a judge or magistrate that they have "probable cause" to believe safety hazards exist at a certain workplace.

The court's ruling virtually guts the Labor Department's strategy of keeping private employers alert to safety needs by holding over them the possibility of a surprise visit by government inspectors.

Government lawyers had argued that "the effectiveness of the inspection system would be largely nullified if an employer could gain significant delay by refusing to permit an inspection without a warrant."

More than 6 million industry and business locations are subject to checks by the 1,300 field officers of the Labor Department's Occupational Safety and Health Administration.

There was no immediate comment on the ruling from the department or OSHA.

The U.S. Chamber of Commerce, in a statement by President Richard L. Lesher, praised the decision, saying: "The business community ... and the 75 million people earning paychecks in the private sector should be delighted with this blow for freedom."

"The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search," White's opinion said.

"A warrant, by contrast, would provide assurances from a neutral officer (a judge or magistrate) that the inspection is reasonable under the Constitution, is authorized by statute and is pursuant to the administrative plan containing specific neutral criteria," he said.

The court's ruling said a warrant would not be needed only when a business owner agreed to submit to a spot check.

Otherwise, warrants are needed and business owners are to obtain prior notice of the requested search authority.

Joining White's opinion were Chief Justice Warren E. Burger and Justices Potter Stewart, Thurgood Marshall and Lewis F. Powell Jr.

Justice John Paul Stevens wrote a dissenting opinion, in which Justices Harry A. Blackmun and William H. Rehnquist joined.

Justice William J. Brennan Jr., who missed arguments in the case because of illness, took no part in the decision.

whether there is a loss to the Reserve Banks or not. But every fraud like the one before us weakens the member bank and therefore weakens the System. Moreover, when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so. It may punish the forgery and utterance of spurious interstate bills of lading in order to protect the genuine commerce. *United States* v. *Ferger,* 250 U. S. 199. See further, *Southern Ry. Co.* v. *United States,* 222 U. S. 20, 26. That principle is settled. Finally, Congress may employ state corporations with their consent as instrumentalities of the United States, *Clallam County* v. *United States,* 263 U. S. 341, and may make frauds that impair their efficiency crimes. *United States* v. *Walter,* 263 U. S. 15. We answer the question: *Yes.*

UNITED STATES *v.* SULLIVAN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 851. Argued April 27, 1927.—Decided May 16, 1927.

1. Gains from illicit traffic in liquor are subject to the income tax. P. 263.
2. The Fifth Amendment does not protect the recipient of such income from prosecution for wilful refusal to make any return under the income tax law. P. 263.
3. If disclosures called for by the return are privileged by the Amendment, the privilege should be claimed in the return. P. 264.

15 F. (2d) 809, reversed.

CERTIORARI (273 U. S. 689) to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court sentencing Sullivan for wilfully refusing to make a return of net income under the Revenue Act of 1921.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell,* and *Messrs. A. W. Gregg,* General Counsel, Bureau of Internal Revenue, *Sewall Key,* Attorney in the Department of Justice, and *Raymond L. Joy,* were on the brief, for the United States.

The gains and profits derived from illicit traffic in liquor constitute income. It has been uniformly held by the courts that such income was intended by Congress to fall within the purview of the Income Tax Act of 1921. This interpretation is shown by the all-inclusive language used by Congress to define income and by the history of the changes in income-tax legislation. The questions asked in the required income tax return do not compel the disclosure of any fact which tends to incriminate. Only information of the most general character relating to the nature of the taxpayer's business is demanded, none of which in itself constitutes proof of unlawful dealings. In determining the nice balance that exists between the constitutional rights of the individual and the sovereign's right to compel information necessary for governmental purposes the courts will go as far "as may be consistent with the liberty of the individual." This is illustrated in *Mason* v. *United States,* 244 U. S. 362, and *Ex parte Irvine,* 74 Fed. 954. The taxpayer will not be permitted to set himself up as the judge of his rights under the Fifth Amendment. He must comply with the Government's demand on him for information at least to the point where the information would tend to incriminate. *Podolin* v. *Lesher Warner Dry Goods Co.,* 210 Fed. 97. In this case respondent failed to raise any claim of immunity he might have had under the Fifth Amendment in the proper manner and form, and in the failure to do so his privilege must be deemed to be waived. *United States ex rel. Vajtauer* v. *Comm'r of Immigration,* 273 U. S. 103.

A tax return is the statement of account between the taxpayer and his Government. It is impressed with a

public interest and constitutes a public document. The cases of *Boyd* v. *United States,* 116 U. S. 616, and *Wilson* v. *United States,* 221 U. S. 361, both recognize that records required by law to be kept constitute an exception to the application of the Fifth Amendment. Numerous State cases have recognized this principle. *United States* v. *Sischo,* 262 U. S. 165, is authority for the Government's contention herein, because the effect of the Fifth Amendment on the interpretation contended for by the Government, of the statute requiring manifests, underlay the whole case. The effect of the interpretation of the Circuit Court of Appeals of the Income Tax Act in this case would be to favor the lawbreaker and excuse from the operation of the Act any person who set up a claim that his income had been derived from criminal operations. Such interpretation is to be avoided because it is contrary to the purposes of the Act and is not demanded by a proper application of the Fifth Amendment.

Mr. Frederick W. Aley, with whom *Mr. E. Willoughby Middleton* was on the brief, for respondent.

Section 223 of the Revenue Act of 1921, in so far as it requires an income tax return of one whose income is derived from a violation of the criminal law, is in conflict with the Fifth Amendment. The obvious intent of the Fifth Amendment is that no one shall be compelled to be the means of exposing his own criminality. This privilege is for the protection of the innocent as well as the guilty, and is intended to prevent for all time anything in the nature of inquisitorial proceedings to compel confession of crime. Such protection is an essential part of the liberties of a free people and should be jealously guarded from encroachment by the legislative branch of the government. *United States* v. *Boyd,* 116 U. S. 616; *Counselman* v. *Hitchcock,* 142 U. S. 547; *Emory's Case,* 107 Mass. 172; *McKnight* v. *United States,* 115 Fed. 972.

See *Steinberg* v. *United States,* 14 F. (2d) 564, and *Peacock* v. *Pratt,* 121 Fed. 772.

The privilege is not limited to testimony, as ordinarily understood, but extends to every means by which one may be compelled to produce information which may incriminate. *Boyd* v. *United States, supra; Brown* v. *Walker,* 161 U. S. 591. Distinguishing *Hale* v. *Henkel,* 201 U. S. 43; *Wilson* v. *United States,* 221 U. S. 361; *Baltimore etc. R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612; and *United States.* v. *Sischo,* 262 U. S. 165. See *McCarthy* v. *Arndstein,* 266 U. S. 34; *United States* v. *Lombardo,* 228 Fed. 980; *United States* v. *Dalton,* 286 Fed. 756; *United States* v. *Mulligan,* 268 Fed. 893; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; *United States* v. *Sherry,* 294 Fed. 684.

The Income Tax Law does not grant immunity from prosecution.

The question of immunity is properly before this Court.

Direct proceeds of crimes against the laws of the United States cannot be considered as income within the meaning of the Income Tax Law of 1921. *Eisner* v. *Macomber,* 262 U. S. 189; *Steinberg* v. *United States, supra; Smith* v. *Minister of Finance,* 2 Dom. L. Rep., reversed by Privy Council.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The defendant in error was convicted of wilfully refusing to make a return of his net income as required by the Revenue Act of 1921; November 23, 1921, c. 136, §§ 223 (a), 253; 42 Stat. 227, 250, 268. The judgment was reversed by the Circuit Court of Appeals. 15 F. (2d) 809. A writ of certiorari was granted by this Court.

We may take it that the defendant had sufficient gross income to require a return under the statute unless he was exonerated by the fact that the whole or a large

part of it was derived from business in violation of the National Prohibition Act. The Circuit Court of Appeals held that gains from illicit traffic in liquor were subject to the income tax, but that the Fifth Amendment to the Constitution protected the defendant from the requirement of a return.

The Court below was right in holding that the defendant's gains were subject to the tax. By § 213 (a) gross income includes "gains, profits, and income derived from . . . the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." These words are also those of the earlier Act of October 3, 1913, c. 16, § II, B; 38 Stat. 114, 167, except that the word 'lawful' is omitted before 'business' in the passage just quoted. By § 600; 42 Stat. 285, and by another Act approved on the same day Congress applied other tax laws to this forbidden traffic. Act of November 23, 1921, c. 134, § 5; 42 Stat. 222, 223. *United States* v. *One Ford Coupé*, 272 U. S. 321, 327. *United States* v. *Stafoff*, 260 U. S. 477, 480. We see no reason to doubt the interpretation of the Act, or any reason why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay.

As the defendant's income was taxed, the statute of course required a return. See *United States* v. *Sischo*, 262 U. S. 165. In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application

of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law. *Mason* v. *United States,* 244 U. S. 362. *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103. In this case the defendant did not even make a declaration, he simply abstained from making a return. See further the decision of the Privy Council, *Minister of Finance* v. *Smith,* [1927] A. C. 193.

It is urged that if a return were made the defendant would be entitled to deduct illegal expenses such as bribery. This by no means follows, but it will be time enough to consider the question when a taxpayer has the temerity to raise it.

Judgment reversed.

HALE v. HENKEL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 340. Argued January 4, 5, 1906.—Decided March 12, 1906.

Under the practice in this country the examination of witnesses by a Federal grand jury need not be preceded by a presentment or formal indictment, but the grand jury may proceed, either upon their own knowledge or upon examination of witnesses, to inquire whether a crime cognizable by the court has been committed, and if so they may indict upon such evidence. In summoning witnesses it is sufficient to apprise them of the names of the parties with respect to whom they will be called to testify without indicating the nature of the charge against them, or laying a basis by a formal indictment.

The examination of a witness before a grand jury is a "proceeding" within the meaning of the proviso to the general appropriation act of 1903, that no person shall be prosecuted on account of anything which he may testify in any proceeding under the Anti-trust Law. The word should receive as wide a construction as is necessary to protect the witness in his disclosures.

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, and does not apply if the criminality is taken away. A witness is not excused from testifying before a grand jury under a statute which provides for immunity, because he may not be able, if subsequently indicted, to procure the evidence necessary to maintain his plea. The law takes no account of the practical difficulty which a party may have in procuring his testimony.

A witness cannot refuse to testify before a Federal grand jury in face of a Federal statute granting immunity from prosecution as to matters sworn to, because the immunity does not extend to prosecutions in a state court. In granting immunity the only danger to be guarded against is one within the same jurisdiction and under the same sovereignty.

The benefits of the Fifth Amendment are exclusively for a witness compelled to testify against himself in a criminal case, and he cannot set them up on behalf of any other person or individual, or of a corporation of which he is an officer or employé.

A witness who cannot avail himself of the Fifth Amendment as to oral testimony, because of a statute granting him immunity from prosecution, cannot set it up as against the production of books and papers, as the same statute would equally grant him immunity in respect to matters proved thereby.

The search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel the production upon a trial of documentary evidence through a *subpœna duces tecum*.

While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, a corporation is a creature of the State, and there is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers.

There is a clear distinction between an individual and a corporation, and the latter, being a creature of the State, has not the constitutional right to refuse to submit its books and papers for an examination at the suit of the State; and an officer of a corporation which is charged with criminal violation of a statute cannot plead the criminality of the corporation as a refusal to produce its books.

Franchises of a corporation chartered by a State are, so far as they involve questions of interstate commerce, exercised in subordination to the power of Congress to regulate such commerce; and while Congress may not have general visitatorial power over state corporations, its powers in vindication of its own laws are the same as if the corporation had been created by an act of Congress.

A corporation is but an association of individuals with a distinct name and legal entity, and in organizing itself as a collective body it waives no appropriate constitutional immunities, and although it cannot refuse to produce its books and papers it is entitled to immunity under the Fourth Amendment against *unreasonable* searches and seizures, and where an examination of its books is not authorized by an act of Congress a *subpœna duces tecum* requiring the production of practically all of its books and papers is as indefensible as a search warrant would be if couched in similar terms.

Although the *subpœna duces tecum* may be too broad in its requisition, where the witness has refused to answer any question, or to produce any books or papers, this objection would not go to the validity of the order committing him for contempt.

THIS was an appeal from a final order of the Circuit Court made June 18, 1905, dismissing a writ of *habeas corpus* and remanding the petitioner Hale to the custody of the marshal.

The proceeding originated in a *subpœna duces tecum*, issued April 28, 1905, commanding Hale to appear before the grand jury at a time and place named, to "testify and give evidence

in a certain action now pending . . . in the Circuit Court of the United States for the Southern District of New York, between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company on the part of the United States, and that you bring with you and produce at the time and place aforesaid":

1. All understandings, agreements, arrangements, or contracts, whether evidenced by correspondence, memoranda, formal agreements, or other writings, between MacAndrews & Forbes Company and six other firms and corporations named, from the date of the organization of the said MacAndrews & Forbes Company.

2. All correspondence by letter or telegram between MacAndrews & Forbes Company and six other firms and corporations.

3. All reports made or accounts rendered by these six companies or corporations to the principal company.

4. Any agreements or contracts or arrangements, however evidenced, between MacAndrews & Forbes Company and the Amsterdam Supply Company or the American Tobacco Company or the Continental Company or the Consolidated Tobacco Company.

5. All letters received by the MacAndrews & Forbes Company since the date of its organization from thirteen other companies named, located in different parts of the United States and also copies of all correspondence with such companies.

Petitioner appeared before the grand jury in obedience to the subpœna, and before being sworn asked to be advised of the nature of the investigation in which he had been summoned; whether under any statute of the United States, and the specific charge, if any had been made, in order that he might learn whether or not the grand jury had any lawful right to make the inquiry, and also that he be furnished with a copy of the complaint, information or proposed indictment upon which they were acting; that he had been informed that there was no action pending in the Circuit Court as stated in the subpœna, and that the grand jury was investigating no specific charge against

any one, and he therefore declined to answer: First, because there was no legal warrant for his examination, and, second, because his answers might tend to incriminate him.

After stating his name, residence and the fact that he was secretary and treasurer of the MacAndrews & Forbes Company, he declined to answer all other questions in regard to the business of the company, its officers, the location of its office, or its agreement or arrangements with other companies. He was thereupon advised by the Assistant District Attorney that this was a proceeding under the Sherman Act to protect trade and commerce against unlawful restraint and monopolies; that under the act of 1903, amendatory thereof, no person could be prosecuted or subjected to any penalty or forfeiture on account of any matter or thing concerning which he might testify or produce documentary evidence in any prosecution under said act, and that he thereby offered and assured appellant immunity from punishment. The witness still persisted in his refusal to answer all questions. He also declined to produce the papers and documents called for in the subpœna:

First. Because it would have been a physical impossibility to have gotten them together within the time allowed.

Second. Because he was advised by counsel that he was under no legal obligations to produce anything called for by the subpœna.

Third. Because they might tend to incriminate him.

Whereupon the grand jury reported the matter to the court, and made a presentment that Hale was in contempt, and that the proper proceedings should be taken. Thereupon all the parties appeared before the Circuit judge, who directed the witness to answer the questions and produce the papers. Appellant still persisting in his refusal, the Circuit judge held him to be in contempt, and committed him to the custody of the marshal until he should answer the questions and produce the papers. A writ of *habeas corpus* was thereupon sued out, and a hearing had before another judge of the same court, who discharged the writ and remanded the petitioner.

Mr. De Lancey Nicoll, with whom *Mr. Junius Parker* and *Mr. John D. Lindsay* were on the brief, for appellant in this case and in No. 341 argued simultaneously herewith.[1]

There were no facts authorizing the Circuit Court to entertain any charge against appellant. Unless the grand jury in prosecuting the investigation acted within its jurisdiction, the court had no authority to punish the witness for his supposed contumacy in refusing to answer questions. *People* v. *Cassels*, 5 Hill, 164; *Ex parte Fisk*, 113 U. S. 713; *Scott* v. *McNeal*, 154 U. S. 34; Cooley, Const. Lim. 7th ed. p. 575; *United States* v. *Terry*, 39 Fed. Rep. 355.

No judicial matter was pending in the Circuit Court when appellant was required to attend before the grand jury, or when the orders of May 5 and May 8 were made, in or upon which he could lawfully be required to testify or produce evidence.

Notwithstanding the *subpœna* said "in a certain action," no action was pending; there can be no action, prosecution or criminal proceeding, until after someone has been formally accused of acts constituting a criminal offense by indictment or by information. *Post* v. *United States*, 161 U. S. 583, 587.

Nor was there any particular charge against the corporations named in the *subpœna duces tecum*, or under investigation. The grand jury was merely engaged in an effort to find out whether they had or had not transgressed the Sherman Act.

An *ex parte* investigation, based upon mere suspicion, without any complaint or charge, and that may be without result, is not a "case" or "controversy" within the meaning of the Constitution. *Pacific Railway Commission* v. *Stanford*, 32 Fed. Rep. 241; *Kilbourn* v. *Thompson*, 103 U. S. 168; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447.

The grand jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation; consequently its requirement, and the orders of the court, based upon it and the witness's refusal, were *coram non judice* and void.

---

[1] McAlister *v.* Henkel, *post*, p. 90.

land, 10 Pick. 9; *U. S. Express Co.* v. *Henderson*, 69 Iowa, 40; Greenleaf on Evidence, 469*a*.

If, whenever an officer or employé of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to

act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations.

4. Although, for the reasons above stated, we are of the

opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. *Gulf &c. Railroad Company* v. *Ellis*, 165 U. S. 150, 154, and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpœna duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Com-

pany, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different States in the Union.

If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpœna. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpœna of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex parte Brown*, 72 Missouri, 83; *Shaftsbury* v. *Arrowsmith*, 4 Ves. 66; *Lee* v. *Angas*, L. R. 2 Eq. 59.

Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment.

But this objection to the subpœna does not go to the validity of the order remanding the petitioner, which is, therefore,

Affirmed.

MR. JUSTICE HARLAN, concurring.

I concur entirely in what is said in the opinion of the court

Edward M. HELIGMAN, Appellant,

v.

UNITED STATES of America, Appellee.

No. 19288.

United States Court of Appeals
Eighth Circuit.

March 5, 1969.

Rehearing Denied March 27, 1969.

Certiorari Denied June 23, 1969.
See 89 S.Ct. 2129.

Defendant was convicted in the United States District Court for the Eastern District of Missouri, John K. Regan, J., of failing to file corporate income tax returns for years 1961 and 1962, and he appealed. The Court of Appeals, Gibson, Circuit Judge, held that Federal Constitution's privilege against self-incrimination did not extend to corporation president and excuse his failure to file or cause to be filed corporation's tax returns on theory that filing of corporate tax returns might have incriminated president with respect to potential or pending criminal charges of Interstate Commerce Act violations.

Affirmed.

1. Witnesses ⇐308

Taxpayer who asserts privilege against self-incrimination as to tax return questions or Internal Revenue Service interrogation is not final arbiter of claimed privilege and privilege must be specifically claimed on particular ques-

tion and matter submitted to court for its determination. U.S.C.A.Const. Amend. 5.

2. Witnesses ⇐297(1)

Federal Constitution's privilege against self-incrimination did not extend to corporation president to excuse his failure to file or cause to be filed corporation's tax returns on theory that filing of corporate tax returns might have incriminated president with respect to potential or pending criminal charges of Interstate Commerce Act violations. 26 U.S.C.A. (I.R.C.1954) §§ 6062, 7203; U.S.C.A.Const. Amend. 5.

3. Witnesses ⇐298

Corporation president who unsuccessfully sought to excuse failure to file corporate income tax returns on theory that in doing so he might have incriminated himself with respect to potential pending criminal charges of Interstate Commerce Act violations was not privileged to refuse production of any corporate records on ground that they would incriminate him. 26 U.S.C.A. (I.R.C.1954) §§ 6062, 7203; U.S.C.A.Const. Amend. 5.

4. Corporations ⇐395

Corporate records are not personal records and government has right to view such records for legitimate investigative purposes.

5. Witnesses ⇐297(13)

Corporate president who sought to excuse failure to file corporate income tax returns on theory that in doing so he might have incriminated himself was not confronted by any substantial and real hazard of compelled incrimination where he could easily have had some other corporate officer sign return and file it. 26 U.S.C.A. (I.R.C.1954) §§ 6062, 7203; U.S.C.A.Const. Amend. 5.

Irl B. Baris, of Newmark & Baris, St. Louis, Mo., for appellant.

King M. Trimble, Asst. U. S. Atty., St. Louis, Mo., for appellee, Veryl L. Riddle, U. S. Atty., St. Louis, Mo., on the brief.

Before MATTHES, GIBSON and LAY, Circuit Judges.

FLOYD R. GIBSON, Circuit Judge.

The defendant Edward M. Heligman was convicted of violating 26 U.S.C. § 7203, which requires, in addition to other obligations, the making (and filing) of income tax returns.[1] This section requires all corporations to file a corporate income tax return; and under 26 U.S.C. § 6062 a corporate return "shall be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized so to act."

Defendant was president of the E & H Leasing Company and as president failed to file or cause to be filed corporate income tax returns for the calendar years 1961 and 1962. He was sentenced to one year on each count, the terms to run concurrently.

The facts constituting the offense were admitted and stipulated by the defendant in the trial to the Court.[2] Defendant's only defense was a Fifth Amendment claim that he should not have been called upon to make or file corporate returns since by so doing he might have incriminated himself with respect to potential or pending criminal charges of Interstate Commerce Act violations.

The factual basis for Heligman's Fifth Amendment claim is that on December 4, 1962 a criminal information was filed against him, charging him with 65 violations of the Interstate Commerce Act, committed between October 3, 1960 and April 13, 1962. Pertinent elements of

1. Section 7203 in pertinent part states:
"Any person * * * required by this title or by regulations made under authority thereof to make a return * * *, who willfully fails to * * * make such return, * * * at the time or times required by law or regulations, shall * * * be guilty of a misdemeanor * * *."

2. The Honorable John K. Regan, United States District Judge for the Eastern District of Missouri.

each violation were that Heligman knew the corporation was violating the law and that he knowingly aided the illegal activity. These charges apparently arose out of the operation of related corporations and not the E & H Leasing Company. No charges were filed against the E & H Leasing Company, but Heligman was under investigation.

The legal basis for the Fifth Amendment claim is that the Supreme Court's interpretation of the Fifth Amendment [3] privilege against incrimination in Albertson v. Subversive Activities Control Board, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965), and in the trilogy of Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), Grosso v. United States, 390 U.S. 62, 88 S.Ct. 716, 19 L.Ed.2d 906 (1968) and Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968) is broad enough to excuse defendant from the statutory obligation to file the corporate income tax returns of E & H Leasing Company of which he was president, where by so doing, he might have incriminated himself.

Defendant claims that to have signed the corporate income tax return, in his capacity as corporation president, for the calendar year 1961, while he was violating the law, and to have similarly signed the corporate income tax return for the calendar year 1962, while criminal charges were outstanding against him, (he pleaded guilty to 30 counts of the information on March 18, 1963) would clearly have incriminated him in that it would have supplied proof of his corporate position and by inference would have supplied proof of his knowledge of the unlawful operations of the E & H Leasing Company or related corporations. Defendant, therefore, maintains that with his and the defendant corporation's and related corporations' background of Interstate Commerce violations he had reasonable cause to apprehend danger from the filing of the corporate tax returns, and such filing would have furnished a link in the chain of evidence needed to prosecute him for a federal crime. The defendant does not pinpoint specific inquiries or answers in the corporate return that would be incriminatory but asserts that signing the corporate tax return as president would reveal the fact that he was president of the corporation and as president would know that the corporation was violating the law and that he knowingly and willfully aided and abetted the corporate offense.

The Government considers the matter controlled by United States v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927), where a unanimous court in an opinion by Mr. Justice Holmes held that the income tax law applies to illegal gains and that the Fifth Amendment protection does not protect the recipient of illegal gains from prosecution for willful failure to make a return. That Court further held at 263, 47 S.Ct. at 607 that if the return called "for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all."

[1] The rationale declared in *Sullivan* was followed by us in Daly v. United States, 393 F.2d 873 (1968), where we held that a taxpayer was not entitled to a blanket Fifth Amendment objection to an inquiry and interrogation by the Internal Revenue Service, and that the taxpayer, "cannot assert the privilege to every question asked by the examiner, most of which are innocuous on their face." We thus left open the question as indicated in *Sullivan* of whether there might be specific questions in the return, or as in *Daly* in the interrogation, the answers to which might be privileged. But the taxpayer is not the final arbiter of the privilege. The privilege must be specifically claimed on a par-

3. The Fifth Amendment to the United States Constitution in part states: "No person * * * shall be compelled in any criminal case to be a witness against himself."

ticular question and the matter submitted to the court for its determination as to the validity of the claim.

The defendant here, however, claims a blanket privilege against the mere making or filing of the return. The cases relied on by defendant have held filing or registration statutes invalid that require an individual to disclose a certain status (as a gambler) or a criminal act (illegal possession of firearms or membership in a subversive organization) that would leave him exposed to either a federal or state prosecution.

In *Albertson* the Court held the Subversive Activities Control Act of 1950, 50 U.S.C. § 786, unconstitutional in requiring registration of the Communist party as an organization and of its members as individuals because the registration was inherently incriminatory since the admission of Communist party membership or affiliation "might be used as evidence in or at least supply investigatory leads to a criminal prosecution." (at 78, 86 S.Ct. at 198) under various other anti-subversion statutes. The Court distinguished *Sullivan* by viewing the questions in the income tax return as neutral on their face and directed at the public at large, whereas the registration of subversive organizations was directed at a "highly selective group inherently suspect of criminal activities." (at 79, 86 S.Ct. at 199). In *Marchetti* and *Grosso* the Court held the Fifth Amendment privilege against self-incrimination barred an individual's prosecution for violating the federal wagering tax statutes, 26 U.S.C. §§ 4411 and 4412, on the ground "that the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." at 48 of 390 U.S. at 702 of 88 S.Ct. The Court further held in *Marchetti* that the "required records" doctrine of Shapiro v. United States, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948) could not be utilized to preclude assertion of the constitutional privilege and that *Shapiro* was inapplicable.

In *Haynes*, the Court held the Fifth Amendment privilege against incrimination applicable in defending a charge of possessing an unregistered firearm, holding the interrelated statutory system for the taxation of certain firearms was "apparently intended to guarantee that only weapons used principally by persons engaged in unlawful activities would be subjected to taxation." (at 87 of 390 U.S., at 725 of 88 S.Ct.); that "the registration clause of [Title 26 U.S.C.] § 5851 is not properly distinguishable from a conviction under § 5841 for failure to register, and that both offenses must be deemed subject to any constitutional deficiencies arising under the Fifth Amendment from the obligation to register." (at 95, 88 S.Ct. at 729); that the registration would be self-incriminatory; and that the registration requirement is directed principally at persons, as noted in *Albertson*, " 'inherently suspect of criminal activities.' " (at 96, 88 S.Ct. at 730).

The defendant distinguishes *Sullivan* by pointing out that in *Sullivan* the tax was imposed upon the taxpayer defendant, whereas here any tax due was a corporate obligation and not a personal one of the defendant. He views his obligation to file the corporate tax return the same as a "registration" in the *Albertson* case. We are not impressed by this argument.

The defendant, as a corporation president, had a statutory obligation to either file or cause to be filed a proper corporate tax return. The affirmative requirements of § 7203 are directed to all taxpayers, corporate and individual, who are subject to filing a return under the tax laws. It is neutral in its application and is not directed against a group "inherently suspect of criminal activities." Corporation presidents and the other corporate officers mentioned in § 6062 are not an inherently suspect group.

[2] It belabors the obvious to point out that the purpose of the tax laws is to raise public funds, that adequate operation of taxing procedures is vital to

the well-being of this country, and that the basic purpose of the tax laws is not to punish extraneous crimes but to assess and collect revenue. Offenses for violations of the tax laws are, of course, set up as a necessary enforcement measure. Our income tax system is to a large extent predicated upon the voluntary disclosure of taxable income. The operation of this system is of crucial concern to the nation. The public need for requiring voluntary disclosures of income transcends any personal right to thwart national objectives by allowing an undisclosed self-determination of possible incrimination, thus excusing compliance with the income tax laws. We, therefore, hold that the Fifth Amendment privilege against incrimination does not extend to defendant's failure to file or cause to be filed the corporate tax returns of E & H Leasing Company.

[3, 4] Furthermore, the defendant was not privileged to refuse the production of corporate records nor could he withhold any incriminatory corporate records. These are not personal records and the government has a right to view corporate records for legitimate investigative purposes. Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538, 55 L. Ed. 771 (1911) long ago held that the president of a corporation could not refuse to produce corporate records on the ground that they would incriminate him, stating at 384, 31 S.Ct. at 546.

> "If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures."

Later the Supreme Court of the United States in United States v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944) held an officer of a labor union could not refuse to produce union records under a Fifth Amendment claim against self-incrimination, the Court reasoning at 699, 64 S.Ct. at 1251.

> "But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination."

[5] There is another aspect of defendant's claim which should be mentioned. While we are of the opinion that the Fifth Amendment claim against self-incrimination is not available to the defendant under the facts of this case, it is difficult for us to perceive how the defendant can seriously advance his claim when he could easily have had some other corporate officer sign the return and file it so that actually he was not confronted by any substantial and real hazard of compelled incrimination. See *Marchetti* at p. 53, 88 S.Ct. 697. Also the information of his position as president of the E & H Leasing Company was readily available to the Government through the office of the Secretary of State of Missouri, who must by law keep a public record of the officers of Missouri corporations. V.A.M.S. § 351.120. Also there are probably many other sources where this information would be available such as occupational licenses and other business reports and filings. In fact defendant admitted in oral argument that the Government knew, at the times under consideration, that he was president of E & H Leasing Company.

We fail to see any substance to the argument that defendant feared self-incrimination by disclosing his corporate position on a tax return when the Government already knew him to be, or had access to public records showing him to be, president of E & H Leasing Company.

Judgment of the District Court is affirmed.

UNITED STATES of America, Plaintiff-Appellant,

v.

Albert DICKERSON, Defendant.

No. 17349.

United States Court of Appeals
Seventh Circuit.

July 28, 1969.

Rehearing Denied Sept. 5, 1969.

Prosecution for failure to file income tax returns. The United States District Court for the Northern District of Illinois, Eastern Division, Abraham L. Marovitz, J., 291 F.Supp. 633, granted defendant's motion to suppress certain evidence and government appealed. The Court of Appeals, Cummings, Circuit Judge, held that without regard to taxpayer's subjective state of mind, Miranda warnings must be given to taxpayer under criminal investigation by either the revenue agent or the special agent at the inception of the first contact with taxpayer after case has been transferred to the Intelligence Division of Internal Revenue Service, so that documentary and oral information obtained from taxpayer by an Internal Revenue agent and a special agent for the Intelligence Division of the Internal Revenue Service, without advising taxpayer that the investigation had become criminal and without advising taxpayer of his Miranda rights, was subject to suppression.

Affirmed.

Fairchild, Circuit Judge, dissented.

1. Criminal Law ⇐393(1)

Privilege against self-incrimination is imperiled when one deprived of his

freedom of action in any significant way is subjected to interrogation without being apprised of his right to remain silent, the consequences of a decision to forego that right, and the right to presence of an attorney, retained or appointed, to assist in making such decision.

2. Constitutional Law ⇐43(1)

One confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances.

3. Criminal Law ⇐412.2(3)

Incriminating statements elicited from a taxpayer under criminal investigation by Internal Revenue agents in reliance on taxpayer's misapprehension as to danger of inquiry, his obligation to respond, and possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warnings.

4. Criminal Law ⇐412.2(3)

Without regard to taxpayer's subjective state of mind, Miranda warnings must be given to taxpayer under criminal investigation by either the revenue agent or the special agent at the inception of the first contact with taxpayer after case has been transferred to the Intelligence Division of Internal Revenue Service.

5. Criminal Law ⇐394.6(2)

Documentary and oral information obtained from taxpayer by an Internal Revenue agent and a special agent for Intelligence Division of Internal Revenue Service, without advising taxpayer that investigation had become criminal and without advising taxpayer of his Miranda rights, was subject to suppression.

Thomas A. Foran, U. S. Atty., Chicago, Ill., Johnnie M. Walters, Asst. Atty. Gen., Joseph M. Howard, Richard B. Buhrman, Mitchell Rogovin, Joseph M. Howard, Attys., Dept. of Justice, Tax Division, Washington, D. C., for appellant.

William A. Barnett, Chicago, Ill., for appellee; William R. Quinlan, Chicago, Ill., of counsel.

Before FAIRCHILD and CUMMINGS, Circuit Judges, and GRANT, District Judge.[1]

CUMMINGS, Circuit Judge.

In April 1967, defendant was indicted for failure to file income tax returns for 1960, 1961 and 1962 in violation of Section 7203 of the Internal Revenue Code (26 U.S.C. § 7203). In March 1968, claiming a violation of his rights under the Fourth and Fifth Amendments, he filed a motion for the return of certain property and for the suppression of evidence. The motion was based on the admitted failure of the Internal Revenue Agents to warn him of his constitutional rights during five interviews with him.

Based on an affidavit of defendant and the testimony of Revenue Agent Donald Petrovic at the hearing on the motion to suppress, the district court found that while "auditing" a scavenger company Petrovic found an entry on its books reflecting a large payment to defendant but that the company had filed no related information return. Consequently in July 1964, Petrovic "audited" defendant, who admitted that he had failed to file certain income tax returns. Late that year Petrovic referred the case to his superiors to determine if the case warranted criminal investigation. In January 1965, the case was assigned to Special Agent Cornue, an investigator for the Intelligence Division of the Internal Revenue Service. The jurisdiction of the Intelligence Division is limit-

1. Chief Judge Grant is sitting by designation from the United States District Court for the Northern District of Indiana.

22

ed to criminal investigations. Petrovic was assigned to assist Cornue. Their joint investigation began on March 24, 1965, with a visit to defendant at his place of business. On that occasion, Cornue identified himself as a Special Agent but did not advise defendant that the investigation had become criminal, nor was defendant advised of any of his constitutional rights. Petrovic and Cornue again saw defendant on May 7, 1965, and Cornue alone interviewed defendant on March 29, April 1, April 6 [2] and June 24, 1965.

Cornue's affidavit in support of the Government's motion for reconsideration showed that at the June 24, 1965 interview, defendant said he had engaged a lawyer and had given him "everything he could find that had anything to do with his income tax." Defendant's lawyer was present when defendant was next interviewed by both agents on November 10, 1965.

The Government's brief concedes that the indictment resulted from the information gathered at five of the earlier interviews. These are the occasions when, according to his affidavit, defendant answered the agents' questions and furnished them with documentary and oral information. This affidavit claims that the records surrendered to the agents consisted of personal records of income and expenses, including the names of customers and names of persons to whom commission payments were made.

Relying on Escobedo v. Illinois, 378 U. S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the district court held that "at and from the time a criminal investigation is launched against a taxpayer," IRS Agents are required to inform him of his right to remain silent, that anything he says may be used against him, and that he has a right to counsel. The *Escobedo* opinion was handed down before the civil or criminal investigations of defendant's tax returns had begun, and *Miranda* was handed down more than a year after the crucial interviews. However, the district court noted that *Miranda* is applicable to all cases filed (as here) after its promulgation.

Applying the *Miranda* rationale, the trial court held that the evidence obtained from defendant during the criminal investigation and before his retention of counsel would have to be suppressed, along with any evidence obtained as a result of information gained during that phase of the criminal investigation. 291 F.Supp. 633. The Government appealed under Title VIII of the Omnibus Crime Control Act (18 U.S.C. § 3731).[3] We affirm.

[1] Both parties seek to find support for their positions in the *Miranda* decision, the Government stressing the physical custody in which the interrogations involved in *Miranda* and its companion cases took place and defendant laying heavy emphasis on the policies underlying the adoption of the *Miranda* warnings. We recognize the factual limitations of the precise holding in *Miranda*. On the other hand, we cannot accept an interpretation of that decision which would restrict the implementation of the Court's overriding concern with

2. The April 6 interview is identified in Special Agent Cornue's affidavit of November 5, 1968.

3. Taxpayer asserts that 18 U.S.C. § 3731 violates his rights to due process and a speedy trial insofar as it permits the Government to appeal from an adverse ruling on a motion to suppress. This point was not pressed at oral argument, and, in light of our disposition of the principal issue presented in the taxpayer's favor, does not merit extended treatment here. Far from suggesting a lack of legislative power to authorize such interlocutory appeals, Carroll v. United States, 354 U.S. 394, 407, 77 S.Ct. 1332, 1 L.Ed.2d 1442 relied on by the taxpayer here, decided only that such appeals were not authorized by statutes then in force. The Court noted, "If there is serious need for appeals by the Government from suppression orders * * * it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases."

-23-

the opportunity for intelligent exercise of constitutional rights to interrogations conducted in police stations. Indeed, the opinion makes clear that the privilege against self-incrimination is imperiled when one "deprived of his freedom of action in any significant way" (384 U.S. at pp. 444, 445, 467, 477, 478, 86 S.Ct. at p. 1612) is subjected to interrogation without being apprised of his right to remain silent, the consequences of a decision to forgo that right, and the right to the presence of an attorney, retained or appointed, to assist in making that decision. And the Court has recently confirmed that these warnings are required prior to interrogating a suspect in his own bedroom if it appears he is not free to go where he pleases. Orozco v. Texas, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311.[4]

[2] Intelligent exercise or waiver of the Fifth Amendment privilege is the heart of the Court's concern in *Miranda*. See 384 U.S. at pp. 475–476, 86 S.Ct. 1602. The Government's brief appears to recognize that ignorant compliance with the requests of the authorities can no longer be equated with a valid waiver of constitutional rights.[5] We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances. No contention is made that the privilege against self-incrimination does not protect one interrogated in a non-custodial setting, only that one in such circumstances has no need of advice as to his rights, or, indeed, of the pendency of a criminal investigation at all. But custodial interrogation is merely one variety of confrontation, albeit one requiring the most stringent of protections for the criminal suspect. The inquiry does not end with custody or its absence. See Hewitt, "The Constitutional Rights of the Taxpayer in a Fraud Investigation," 44 Taxes 660, 668 (1966).

In this Circuit, the district courts recently considering the question have uniformly held that some form of warnings must be given by IRS agents once an investigation has shifted to one criminal in nature, despite the absence of physical custody.[6] The Government has drawn to our attention numerous cases in this and other Courts of Appeals which are said to establish that *Miranda* has no application to criminal tax investigations. Our examination of those and other cases decided after *Miranda* reveals that in almost every instance some warnings were in fact given,[7] an attorney was present.

4. The opinion does not appear to depend upon a formal arrest, and no mention is made of whether Orozco in fact knew that he was not free to leave.

5. Powers v. United States, 223 U.S. 303, 32 S.Ct. 281, 56 L.Ed. 448, and Wilson v. United States, 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090, are cited as "prior law."

6. United States v. Turzynski, 268 F.Supp. 847 (N.D.Ill.1967); United States v. Dickerson, 291 F.Supp. 633 (N.D.Ill. 1968); United States v. Habig, No. IP 66–CR–138 (S.D.Ind. Nov. 19, 1968) (unreported); United States v. Lackey, Lafayette Criminal No. 177 (N.D.Ind. Oct. 2, 1968) (unreported); United States v. Townsend, No. IP 65–CR–115 (S.D.Ind. Sept. 14, 1966) (unreported). To the same effect, see Goodman v. United States, 285 F.Supp. 245 (C.D.Cal. 1968); United States v. Wainright, 284 F.Supp. 129 (D.Colo.1968); United States v. Gower, 271 F.Supp. 655, 660 (M.D.Pa.1967); United States v. Kingery, 67–1 U.S.Tax Cas. ¶ 9262 (N.D. Fla.1967); United States v. Schoenberg, 67–1 U.S.Tax Cas. ¶ 9393 (D.Ariz. 1966). See also United States v. Guerrina, 112 F.Supp. 126 (E.D.Pa.1953), modified, 126 F.Supp. 609 (E.D.Pa. 1955).

7. *E. g.*, United States v. Mansfield, 381 F.2d 961 (7th Cir. 1967), certiorari denied, 389 U.S. 1015, 88 S.Ct. 593, 19 L.Ed.2d 661; Muse v. United States, 405 F.2d 40 (8th Cir. 1968); United States v. Mackiewicz, 401 F.2d 219 (2d Cir. 1968); United States v. Squeri, 398 F.2d 785 (2d Cir. 1968); Spinney v. United States, 385 F.2d 908 (1st Cir. 1967),

during the crucial interviews,[8] or the absence of physical custody was considered determinative.[9] We recognize, of course, that language appears in many of these cases which is inconsistent with the conclusion which we reach today. We therefore turn our attention to the asserted distinctions which are said to render the *Miranda* concern that any incriminating statements elicited from a suspect should be "truly the product of free choice" (384 U.S. at p. 457, 86 S.Ct. 1619) inapplicable to criminal investigations by the IRS.

A line of cases originating between the *Escobedo* and *Miranda* decisions, notably Kohatsu v. United States, 351 F.2d 898 (9th Cir. 1965), reasons that because the IRS agents cannot determine whether a crime has in fact been committed until their investigation is complete, the adversary process has not sufficiently "focused" on the suspect as to require that warnings be given. But as Judge Will observed in his persuasive opinion in United States v. Turzynski, 268 F.Supp. 847, 852–853 (N.D.Ill.1967):

> "This distinction between a criminal tax investigation where the taxpayer is suspected of a tax fraud not yet fully identified and a criminal investigation where a known violation of the law is attempted to be linked to a particular suspect is logically irrelevant for purposes of determining when the adversary process has begun, *i.e.*, when the investigative machinery of the government is directed toward the ultimate conviction of a particular individual, and when, therefore, a suspect should be advised of his rights. What matter if the culprit be known before the crime or the crime before the culprit. In either case the investigator is attempting to develop evidence for the purpose of criminal prosecution and conviction."

Nor can the *Kohatsu* rationale, once accepted, be limited to investigations in the tax area. Such a rationale would apply to most white collar crimes and any other crimes where the identity of the suspected lawbreaker is not in issue. This category might include unauthorized practice of law, attempted bribery, impersonation of a federal officer, refusal to report for induction, violations of Section 5 of the Securities Act, the Landrum-Griffin Act, and the Sherman Act, among others. No principled distinction has been suggested which would carve out such exceptions to the policies expressed in *Miranda*.

Such a distinction cannot survive the Supreme Court's desision in Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381, where the Government sought to escape the application of *Miranda* to an interrogation of a taxpayer incarcerated for an unrelated offense because the questions were asked as a part of a routine tax investigation where criminal proceedings might never be brought. Noting that "tax investigations frequently lead to criminal prosecutions," just as the one here did, (391 U.S. at p. 6, 88 S.Ct. at p. 1506), the Court rejected any such distinction as "too minor and shadowy" to warrant a departure from *Miranda*.

The Government argues that the absence of custodial detention and other indicia of criminal prosecution in the tax fraud investigation negatives any possibility of coercion or overbearing of

certiorari denied, 390 U.S. 921, 88 S.Ct. 854, 19 L.Ed.2d 981; United States v. Maius, 378 F.2d 716 (6th Cir. 1967), certiorari denied, 389 U.S. 905, 88 S.Ct. 216, 19 L.Ed.2d 219; Morgan v. United States, 377 F.2d 507 (1st Cir. 1967).

8. *E. g.*, United States v. Mancuso, 378 F.2d 612 (4th Cir. 1967), certiorari denied, 390 U.S. 955, 88 S.Ct. 1051, 19 L.Ed.2d 1140; United States v. Fidanzi, 411 F.2d 1361 (7th Cir. June 23, 1969).

9. *E. g.*, Housley v. United States, 400 F.2d 481 (10th Cir. 1968); Cohen v. United States, 405 F.2d 34 (8th Cir. 1968), certiorari denied, 394 U.S. 943, 89 S.Ct. 1274, 22 L.Ed.2d 478; Morgan v. United States, *supra*, note 7; Spahr v. United States, 1969 CCH Tax Cas. ¶ 9316 (5th Cir. April 2, 1969).

the taxpayer's will. But it is the very fact that the taxpayer is not informed of the pendency of a criminal investigation which aggravates the dilemma in which he finds himself. Unaware of the possible consequences of his cooperation with the agents, he may nevertheless believe that he is obligated to supply the necessary information in order to satisfy any possible tax deficiency which he may owe. As the district judge observed (291 F.Supp. at pp. 636–637):

> "It would seem to us that the average citizen, faced with repeated questioning by two government agents is in an ominous situation to say the least. The Government suggests that the defendant was in no way physically restrained, but we doubt that he really felt free to walk out on the investigators from the Internal Revenue Service. In the absence of sufficient warnings and the assistance of counsel, there are innumerable factors which act on the taxpayer's mind compelling him to 'co-operate' with the federal authorities."

Only the rare taxpayer would be likely to know that he could refuse to produce his records to IRS agents. Nor would he be likely to make any distinction between revenue agents and special agents without some explanation as to the different functions of these two offices. As noted in Lipton, "Constitutional Rights in Criminal Tax Investigations," 45 F.R.D. 323, 336 (1968), the pressures on the uninformed taxpayer to cooperate with the agents are considerable:

> "First, there is always the fear of incurring a civil tax liability that hopefully might be avoided by cooperation. Also, a taxpayer may conclude that lack of cooperation will result in unwanted publicity about a tax liability. ***The average citizen, moreover, believes that the government prosecutes only the recalcitrant, uncooperative individual who is unwilling to pay what he owes.*** Who would believe the ironic truth that the cooperative taxpayer fares much worse than the individual who relies upon his constitutional rights!" (Emphasis supplied.)

[3] Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warnings. Cf. Gouled v. United States, 255 U.S. 298, 305–306, 41 S.Ct. 261, 65 L.Ed. 647; United States v. Guerrina, 112 F.Supp. 126 (E.D.Pa.1953), modified, 126 F.Supp. 609 (E.D.Pa.1955); Comment, "Constitutional Rights of the Taxpayer in a Tax Fraud Investigation," 42 Tul.L.Rev. 862, 864–865 (1968).

Under such circumstances it is imperative that the taxpayer be advised that he is the subject of a criminal investigation and that he need not answer questions put to him by the agents. "For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise." Miranda v. Arizona, 384 U.S. 436, 468, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694. The rationale behind the warning as to the consequences of waiving the right to remain silent, as expressed in *Miranda*, is particularly apt to the present situation, for "this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." 384 U.S. at p. 469, 86 S.Ct. at p. 1625. As in *Miranda*, we deem advice as to the right to have counsel present a valuable adjunct to the protections of the Fifth Amendment prescribed above.

[4, 5] Our conclusion is that *Miranda* warnings must be given to the taxpayer by either the revenue agent[10] or the

10. In *Mathis*, the Supreme Court required a revenue agent to give the warnings upon first questioning the taxpayer, even though no "full-fledged criminal investi-

pecial agent at the inception of the first ontact with the taxpayer after the case as been transferred to the Intelligence Division.[11] We have reached this conlusion on the basis of our examination f the circumstances surrounding crimnal tax investigations generally, and we ind that the objective circumstances of uch confrontations with government auhority warrant the above warnings ithout regard to the individual taxayer's subjective state of mind.[12] Abent such warnings, the motion to supress in the present case was properly ranted.

In recognition of the fact that this olding represents a departure from the resent state of the law,[13] and a new nplementation of the *Miranda* policy, nd in accordance with the criteria set orth in Stovall v. Denno, 388 U.S. 293, 97, 87 S.Ct. 1967, 18 L.Ed.2d 1199, we ave determined that this decision should e given a prospective application. In ohnson v. New Jersey, 384 U.S. 719, 6 S.Ct. 1772, 16 L.Ed.2d 882, *Miranda* as applied only to cases in which the rial began after the date of the *Miranda* ecision. However, as the Court noted in a more recent case involving a special aspect of the retroactivity of *Miranda*, the approach of the Court to prospective decision-making has undergone some modification since *Johnson* was decided. See Jenkins v. Delaware, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (June 2, 1969). In conformity with the more recent practice as developed in *Stovall*, *supra*, and Desist v. United States, 394 U.S. 244, 89 S.Ct. 1048, 22 L.Ed.2d 248, we have determined to apply our holding to interrogations taking place after the date of this decision. See Schaefer, "The Control of 'Sunbursts': Techniques of Prospective Overruling," 42 N.Y.U.L. Rev. 631, 646 (1967); Fairchild, "Limitation of New Judge-Made Law to Prospective Effect Only: 'Prospective Overruling' or Sunbursting," 51 Marq.L.Rev. 255, 265 (1968). The defendant in the companion *Habig* case, which was argued together with the instant case, will also be entitled to the benefit of today's holding. However, it is not our intent to disturb previously ordered suppressions of evidence anticipating our holding today. See Desist v. United States, 394 U.S. 244,

gation" was begun until eight days later. See 301 U.S. at p. 4, 88 S.Ct. 1503, 20 L.Ed.2d 381. There the suspect was in custody for an unrelated offense. Mindful of the disruptive effect which a blanket requirement of warnings might have if applied to all civil investigations, we have determined that the inception of the first contact with the taxpayer after referral to the Intelligence Division is the appropriate point at which to require the *Miranda*-type warnings outlined above.

11. See Andrews, "The Right to Counsel in Criminal Tax Investigations Under Escobedo and Miranda: The 'Critical Stage,'" 53 Iowa L.Rev. 1074, 1085–1087, 1111, 1116–1117 (1968); Comment, "Constitutional Rights of the Taxpayer in a Tax Fraud Investigation," 42 Tul.L.Rev. 862, 870 (1968).

12. Thus there is no conflict in this respect with United States v. Spomar, 339 F.2d 941 (7th Cir. 1964), certiorari denied, 380 U.S. 975, 85 S.Ct. 1336, 14 L.Ed.2d 270, on which the Government has so heavily relied. Moreover, that was a pre-*Miranda* case, and the defendant did not contend that revenue agents had the duty to advise him of his right to refuse to furnish the requested information (339 F.2d at p. 942).

13. We are informed that since May 1967 the Internal Revenue Service has required special agents to give a modification of the *Miranda* warnings to taxpayers at the first interview. See United States v. Turzynski, 268 F.Supp. 847, 854 (N.D. Ill.1967). The November 1967 instructions to special agents are reproduced in United States v. Wainright, 284 F.Supp. 129, 133 (D.Colo.1968). These instructions were somewhat amplified in November 1968 according to IRS News Release IR-949 (1969 CCH Fed.Tax Rptr., ¶ 6946).

This recent administrative practice, characterized as an act of grace at oral argument, diminishes the impact of our holding today, but does not, in our view, obviate the responsibility of this Court to render judgment in accordance with our understanding of the intendment of *Miranda*.

259, 89 S.Ct. 1048, 22 L.Ed.2d 248 (Harlan, J., dissenting).

Affirmed.

FAIRCHILD, Circuit Judge (dissenting).

The *Miranda* [1] equation is that official questioning of one who is in custody or deprived of his freedom of action in any significant way equals compulsion to answer unless the *Miranda* warnings or other effective means are used to insure absence of compulsion. Underlying its pronouncement were years of judicial experience with the frustrations of case by case decision as to the voluntariness of statements given by persons in police custody (most often state or local). *Mathis* [2] and *Orozco* [3] decide that the equation is valid in the particular situations considered, but do not suggest that compulsion to answer is to be presumed in situations where the person is not in custody or deprived of freedom of action.

It is compulsion to answer which offends against the fifth amendment provision that no person shall be compelled in any criminal case to be a witness against himself. *Miranda* decided that one in custody or deprived of freedom of action and questioned by an officer is subjected to such pressure to answer that the warnings are required in every instance.

This court is now deciding, essentially, that the official character of the revenue agent makes compulsion to answer his questions so probable that the warnings are required to prevent it. Yet the court distinguishes between the revenue agent before IRS has internally decided to consider prosecution and the revenue agent or special agent after such decision.

If a violation of the fifth amendment is really involved, I assume there are types of state agents as well as other types of federal agents who will be reached by this decision.

I think that candor on the part of a special agent who is seeking incriminating evidence is good governmental policy and, as noted in Judge Cummings' able opinion, the IRS has decided as a matter of policy that warnings should be given. It may well lie within federal judicial power to decide to exclude evidence obtained without such candor. But I do not believe the fifth amendment requires it.

1. Miranda v. Arizona (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

2. Mathis v. United States, (1968), 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381.

3. Orozco v. Texas (1969), 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311.

UNITED STATES of America, Plaintiff-Appellee,

v.

Joseph Anthony LICAUSI, Defendant-Appellant.

No. 26741.

United States Court of Appeals
Fifth Circuit.

June 30, 1969.

Rehearing Denied Sept. 5, 1969.

The United States District Court for the Southern District of Florida at Miami, C. Clyde Atkins, J., found defendant guilty of receiving and concealing stolen money and he appealed. The Court of Appeals, Wisdom, Circuit Judge, held, inter alia, that in prosecution for receiving and concealing stolen money, trial court's action in denying defendant's motion for mistrial after court struck evidence relating to stolen checks taken at time of bank robbery was not reversible error and that where there had been no objection to certain testimony as to defendant's affluence shortly after robbery, defendant

MARCHETTI *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 2. Argued January 17–18, 1967.—Reargued October 10, 1967.—Decided January 29, 1968.

Petitioner was convicted for conspiring to evade payment of the occupational tax relating to wagers imposed by 26 U. S. C. § 4411, for evading such payment, and for failing to comply with § 4412, which requires those liable for the occupational tax to register annually with the Internal Revenue Service and to supply detailed information for which a special form is prescribed. Under other provisions of the interrelated statutory system for taxing wagers, registrants must "conspicuously" post at their business places or keep on their persons stamps showing payment of the tax; maintain daily wagering records; and keep their books open for inspection. Payment of the occupational taxes is declared not to exempt persons from federal or state laws which broadly proscribe wagering, and federal tax authorities are required by § 6107 to furnish prosecuting officers lists of those who have paid the occupational tax. Petitioner, whose alleged wagering activities subjected him to possible state or federal prosecution, contended that the statutory requirements to register and to pay the occupational tax violated his privilege against self-incrimination. The Court of Appeals affirmed, relying on *United States* v. *Kahriger*, 345 U. S. 22, and *Lewis* v. *United States*, 348 U. S. 419, which held the privilege unavailable in a situation like the one here involved. *Held:*

1. The recognized principle that taxes may be imposed upon unlawful activities is not at issue here. P. 44.

2. Petitioner's assertion of his Fifth Amendment privilege against self-incrimination barred his prosecution for violating the federal wagering tax statutes. Pp. 48–61.

(a) All the requirements for registration and payment of the occupational tax would have had the direct and unmistakable consequence of incriminating petitioner. Pp. 48–49.

(b) Petitioner did not waive his constitutional privilege by failing to assert it when the tax payments were due. Pp. 50–51.

(c) *United States* v. *Kahriger, supra, Lewis* v. *United States, supra,* both *pro tanto* overruled. Pp. 50–54.

(d) The premises supporting *Shapiro* v. *United States*, 335 U. S. 1 (*viz.*, that the records be analogous to public documents and of a kind which the regulated party has customarily kept, and that the statutory requirements be essentially regulatory rather than aimed at a particular group suspected of criminal activities), do not apply to the facts of this case and therefore *Shapiro*'s "required records" doctrine is not controlling. Pp. 55–57.

(e) Permitting continued enforcement of the registration and occupational tax provisions by imposing restrictions against the use by prosecuting authorities of information obtained thereunder might improperly contravene Congress' purpose in adopting the wagering taxes and impede enforcement of state gambling laws. Pp. 58–60.

352 F. 2d 848, reversed.

Jacob D. Zeldes reargued the cause for petitioner. With him on the brief on the reargument were *David Goldstein, Elaine S. Amendola, Francis J. King* and *Ira B. Grudberg,* and on the original argument *Messrs. Goldstein, King* and *Grudberg.*

Francis X. Beytagh, Jr., reargued the cause for the United States, *pro hac vice.* With him on the brief on the reargument were *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit,* and on the original argument *Solicitor General Marshall, Assistant Attorney General Vinson, Miss Rosenberg* and *Theodore George Gilinsky.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner was convicted in the United States District Court for the District of Connecticut under two indictments which charged violations of the federal wagering tax statutes. The first indictment averred that petitioner and others conspired to evade payment of the annual occupational tax imposed by 26 U. S. C. § 4411. The second indictment included two counts: the first

alleged a willful failure to pay the occupational tax, and the second a willful failure to register, as required by 26 U. S. C. § 4412, before engaging in the business of accepting wagers.

After verdict, petitioner unsuccessfully sought to arrest judgment, in part on the basis that the statutory obligations to register and to pay the occupational tax violated his Fifth Amendment privilege against self-incrimination. The Court of Appeals for the Second Circuit affirmed, 352 F. 2d 848, on the authority of *United States* v. *Kahriger*, 345 U. S. 22, and *Lewis* v. *United States*, 348 U. S. 419.

We granted certiorari to re-examine the constitutionality under the Fifth Amendment of the pertinent provisions of the wagering tax statutes, and more particularly to consider whether *Kahriger* and *Lewis* still have vitality.[1] 383 U. S. 942. For reasons which follow, we have

[1] Certiorari was originally granted in *Costello* v. *United States*, 383 U. S. 942, to consider these issues. Upon Costello's death, certiorari was granted in the present case. 385 U. S. 1000. Marchetti and Costello, with others, were convicted at the same trial of identical offenses, arising from the same series of transactions. Certiorari both here and in *Costello* was limited to the following questions: "Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this Court, especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70 (1965), overrule *United States* v. *Kahriger*, 345 U. S. 22 (1953), and *Lewis* v. *United States*, 348 U. S. 419 (1955)?" After argument, the case was restored to the calendar, and set for reargument at the 1967 Term. 388 U. S. 903. Counsel were asked to argue, in addition to the original questions, the following: "(1) What relevance, if any, has the required records doctrine, *Shapiro* v. *United States*, 335 U. S. 1, to the validity under the Fifth Amendment of the registration and special occupational tax requirements of 26 U. S. C. §§ 4411, 4412? (2) Can an obligation to pay the special occupational tax required by 26 U. S. C. § 4411 be satisfied without filing the registration statement provided for by 26 U. S. C. § 4412?"

concluded that these provisions may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination. The judgment below is accordingly reversed.

I.

The provisions in issue here are part of an interrelated statutory system for taxing wagers. The system is broadly as follows. Section 4401 of Title 26 imposes upon those engaged in the business of accepting wagers an excise tax of 10% on the gross amount of all wagers they accept, including the value of chances purchased in lotteries conducted for profit. Parimutuel wagering enterprises, coin-operated devices, and state-conducted sweepstakes are expressly excluded from taxation. 26 U. S. C. § 4402 (1964 ed., Supp. II). Section 4411 imposes in addition an occupational tax of $50 annually, both upon those subject to taxation under § 4401 and upon those who receive wagers on their behalf.

The taxes are supplemented by ancillary provisions calculated to assure their collection. In particular, § 4412 requires those liable for the occupational tax to register each year with the director of their local internal revenue district. The registrants must submit Internal Revenue Service Form 11–C,[2] and upon it must provide their residence and business addresses, must indicate whether they are engaged in the business of accepting wagers, and must list the names and addresses of their agents and employees. The statutory obligations to register

[2] A July 1963 revision of Form 11–C modified the form of certain of its questions. The record does not indicate which version of the return was available to petitioner at the time of the omissions for which he was convicted. The minor verbal variations between the two do not affect the result which we reach today.

and to pay the occupational tax are essentially inseparable elements of a single registration procedure; [3] Form 11–C thus constitutes both the application for registration and the return for the occupational tax.[4]

In addition, registrants are obliged to post the revenue stamps which denote payment of the occupational tax "conspicuously" in their principal places of business, or, if they lack such places, to keep the stamps on their persons, and to exhibit them upon demand to any Treasury officer. 26 U. S. C. § 6806 (c). They are required to preserve daily records indicating the gross amount of the wagers as to which they are liable for taxation, and to permit inspection of their books of account. 26 U. S. C. §§ 4403, 4423. Moreover, each principal internal revenue office is instructed to maintain for public inspection a listing of all who have paid the occupational tax, and to provide certified copies of the listing upon request to any state or local prosecuting officer. 26 U. S. C.

[3] The Treasury Regulations provide that a stamp, evidencing payment of the occupational tax, may not be issued unless the taxpayer both submits Form 11–C and tenders the full amount of the tax. 26 CFR § 44.4901–1 (c). Accordingly, the Revenue Service has refused to accept the $50 tax unless it is accompanied by the completed registration form; and it has consistently been upheld in that practice. See *United States* v. *Whiting*, 311 F. 2d 191; *United States* v. *Mungiole*, 233 F. 2d 204; *Combs* v. *Snyder*, 101 F. Supp. 531, aff'd, 342 U. S. 939. The United States has in this case acknowledged that the registration and occupational tax provisions are not realistically severable. Brief on Reargument 37–41.

[4] In his trial testimony in *Grosso* v. *United States*, decided herewith, *post*, p. 62, W. Dean Struble, technical advisor to the District Director of Internal Revenue, Pittsburgh, Pennsylvania, described Form 11–C as follows: "A Form 11–C serves two purposes. The first is an application for registry for a wagering tax stamp. After the application is properly filed and the tax paid, at that time the Form 11–C becomes a special tax return." Transcript of Record 90.

III.

The Court's opinion in *Kahriger* suggested that a defendant under indictment for willful failure to register under § 4412 cannot properly challenge the constitutionality under the Fifth Amendment of the registration requirement. For this point, the Court relied entirely upon Mr. Justice Holmes' opinion for the Court in *United States* v. *Sullivan, supra.* The taxpayer in *Sullivan* was convicted of willful failure to file an income tax return, despite his contention that the return would have obliged him to admit violations of the National Prohibition Act. The Court affirmed the conviction, and rejected the taxpayer's claim of the privilege. It concluded that most of the return's questions would not have compelled the taxpayer to make incriminating disclosures, and that it would have been "an extreme if not an extravagant application" of the privilege to permit him to draw within it the entire return. 274 U. S., at 263.

The Court in *Sullivan* was evidently concerned, first, that the claim before it was an unwarranted extension of the scope of the privilege, and, second, that to accept a claim of privilege not asserted at the time the return was due would "make the taxpayer rather than a tribunal the final arbiter of the merits of the claim." *Albertson* v. *SACB,* 382 U. S. 70, 79. Neither reason suffices to prevent this petitioner's assertion of the privilege. The first is, as we have indicated, inapplicable, and we find the second unpersuasive in this situation. Every element of these requirements would have served to incriminate petitioner; to have required him to present his claim to Treasury officers would have obliged him "to prove guilt to avoid admitting it." *United States* v. *Kahriger, supra,* at 34 (concurring opinion). In these circumstances, we cannot conclude that his failure

to assert the privilege to Treasury officials at the moment the tax payments were due irretrievably abandoned his constitutional protection. Petitioner is under sentence for violation of statutory requirements which he consistently asserted at and after trial to be unconstitutional; no more can here be required.

The Court held in *Lewis* that the registration and occupational tax requirements do not infringe the constitutional privilege because they do not compel self-incrimination, but merely impose on the gambler the initial choice of whether he wishes, at the cost of his constitutional privilege, to commence wagering activities. The Court reasoned that even if the required disclosures might prove incriminating, the gambler need not register or pay the occupational tax if only he elects to cease, or never to begin, gambling. There is, the Court said, "no constitutional right to gamble." 348 U. S., at 423.

We find this reasoning no longer persuasive. The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred. See, *e. g., Carnley* v. *Cochran,* 369 U. S. 506. Compare *Johnson* v. *Zerbst,* 304 U. S. 458; and *Glasser* v. *United States,* 315 U. S. 60. To give credence to such "waivers" without the most deliberate examination of the circumstances surrounding them

held that filing of returns containing n information relating to income or ex penses was insufficient to comply wit requirement that taxpayer "make a re turn," that Fifth Amendment did no excuse taxpayer from answering all que tions on return relating to income an expenses, that subpoena directed agains Internal Revenue Service was not erron ously quashed, that district court di not erroneously refuse to instruct jur on definition of a dollar, and that prose cution was not illegal because it was no preceded by some form of administra tive action.

Affirmed.

1. Internal Revenue ⇐1357

Filing of returns containing no in formation relating to income or expense on ground that to do so would constitut a waiver of taxpayer's constitutiona right against self-incrimination was no sufficient to comply with requirement o Internal Revenue Code that taxpaye "make a return" or be subject to crim inal penalties. 26 U.S.C.A. (I.R.C.1954 § 7203.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐393(1)

Privilege against self-incriminatio did not excuse taxpayer's blanket refusa to answer any questions on his return relating to his income or expenses fo years in question absent a reasonabl showing as to how disclosure of amount of legal fees received by him during suc years could possibly incriminate him. 2 U.S.C.A. (I.R.C.1954) § 7203; U.S.C.A Const. Amend. 5.

3. Criminal Law ⇐627.5(4)

Subpoena directed against Interna Revenue Service was not erroneousl quashed where it was clearly overbroad unreasonable, oppressive, and lacking i particularity and relevance. 26 U.S.C.A (I.R.C.1954) § 7203.

UNITED STATES of America, Appellee,

v.

Jerome DALY, Appellant.

No. 73-1059.

United States Court of Appeals, Eighth Circuit.

Submitted June 14, 1973.

Decided July 20, 1973.

Rehearing Denied Aug 9, 1973.

Taxpayer was convicted in the United States District Court for the District of Minnesota, Edward J. Devitt, Chief Judge, of wilfully failing to file an income tax return for years in question, and he appealed. The Court of Appeals

thereto, more or less technical violations, or possession for personal use, which involves the least severe penalties of all." *Id.* at p. 4576.

4. Internal Revenue ⇐28

Claim that only "Legal Tender Dollars" were those which contained a mixture of gold and silver and that only those dollars could be constitutionally taxed was clearly frivolous and refusal to give an instruction supporting such claim was not error. 26 U.S.C.A. (I.R.C.1954) § 7203.

5. Internal Revenue ⇐2431

Criminal prosecution for wilful refusal to file an income tax return for years in question was not illegal because it was not preceded by some form of administrative action. 26 U.S.C.A. (I.R.C. 1954) § 7203.

Jerome Daly, pro se.

Robert G. Renner, U. S. Atty., Minneapolis, Minn., for appellee.

Before VOGEL and VAN OOSTERHOUT, Senior Circuit Judges, and ROSS, Circuit Judge.

PER CURIAM.

This is an appeal from a jury verdict finding the defendant Daly guilty of wilfully failing to file an income tax return for the years 1967 and 1968, in violation of 26 U.S.C.A. § 7203.

It is stipulated that defendant, formerly an attorney, received over $6,000.00 in legal fees in 1967 and more than $10,000.00 in 1968.

Defendant filed what he contends are tax returns for each of the years involved. On the return blanks he supplied his name, address, occupation and signature and a notification "See exhibit A attached hereto." Exhibit A objects to the income tax law as being unconstitutional and states that the taxpayer cannot fill out any of the information sought by the return without waiving his constitutional right against self-incrimination. The purported returns were returned to him because they were found not to be returns required by the law and the regulations in that they were not filled out to include any information as to income or expenses. Purported amended returns were filed substantially the same as the originals which again failed to set out any information with respect to income or expenses, and again asserted defendant's constitutional right to protection against self-incrimination. Defendant for a reversal relies upon the following points:

1. Defendant's filing of returns containing no information relating to income or expenses was nonetheless sufficient to comply with the § 7203 requirement that he "make a return".

2. The Fifth Amendment excuses defendant from answering all questions on the return relating to income and expenses.

3. A subpoena directed against the IRS was erroneously quashed.

4. The district court erroneously refused to instruct the jury on the definition of a dollar.

5. Defendant's criminal prosecution was illegal because it should have been preceded by some form of administrative action.

We find all of defendant's contentions lack merit for the reasons hereinafter stated, and affirm the conviction.

[1] Defendant's first contention is answered by United States v. Porth, 426 F.2d 519 (10th Cir. 1970), where the court held:

> "A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner. 10 Mertens, the Law of Federal Income Taxation, § 55.22 (1964 Revision); Florsheim Bros. Dry Goods Co. v. United States, 280 U.S. 453, 462, 50 S.Ct. 215, 74 L.Ed. 542 (1930); Sanders v. Commissioner of Internal Revenue, 225 F.2d 629 (10th Cir. 1955), cert. denied, 350 U.S. 967, 76 S.Ct. 435, 100 L.Ed. 839 (1956); National Contracting Co. v. Commissioner of

Int. Rev., 105 F.2d 488 (8th Cir. 1939)." 426 F.2d at 523. *See also* Virginia L. Reiman, T.C.Memo 1968-117.

[2] Defendant's second contention involves the scope of his Fifth Amendment protection against self-incrimination. Defendant sees himself in a cruel trilemma: If he filed and answered questions truthfully he would be incriminating himself; if he filed and answered questions untruthfully he would be subjecting himself to a perjury charge; if he failed to file returns he would be committing a crime. *Cf.* United States v. Egan, 459 F.2d 997 (2d Cir. 1972). The chief error in defendant's position is his blanket refusal to answer any questions on the returns relating to his income or expenses for the years in question. "[E]ven [if a particular] question was incriminating, since the government has a substantial interest in its tax revenues, appellant's privilege would relate only to his refusal to respond to the question, not to a total failure to file the return." United States v. Egan, *supra* at 998. As previously suggested, defendant's conduct in this case amounts to "a total failure to file." If the return called "for answers that the defendant was privileged from making he [may raise] the objection in the return, but could not on that account refuse to make any return at all." United States v. Sullivan, 274 U.S. 259, 263, 47 S.Ct. 607, 71 L.Ed. 1037 (1927). In an analogous situation involving this same defendant's "blanket Fifth Amendment objection to an inquiry and interrogation by the Internal Revenue Service" this court held "that the taxpayer, 'cannot assert the privilege to every question asked by the examiner, most of which are innocuous on their face.'" Heligman v. United States, 407 F.2d 448, 450 (8th Cir. 1969), citing Daly v. United States, 393 F.2d 873 (8th Cir. 1968).

In Heligman v. United States, *supra*, this court stated:

> "[T]he taxpayer is not the final arbiter of the privilege. The privilege must be specifically claimed *on a particular question* and the subject matter submitted to the court for its determination as to the validity of the claim.
>
> "The defendant here, however claims a blanket privilege against the mere making or filing of the return
>
> * * * * * *
>
> "The public need for requiring voluntary disclosures of income transcends any personal right to thwart national objectives by allowing an undisclosed self-determination of possible incrimination, thus excusing compliance with the income tax laws. We therefore, hold that the Fifth Amendment privilege against incrimination does not extend to defendant's failure to file. . . ." 407 F.2d 450–451, 452 (emphasis added). *See also* California v. Byers, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971); United States v. MacLeod, 436 F.2d 947 (8th Cir. 1971).

Defendant has made no reasonable showing with respect to how the disclosure of the amount of legal fees he received during the years in question, as shown by the stipulation made at the trial, could possibly incriminate him.

[3] Defendant's third contention is wholly without merit. The subpoena in question was clearly overbroad, unreasonable, oppressive, and lacking in particularity and relevance.

[4] Defendant's fourth contention involves his seemingly incessant attack against the federal reserve and monetary system of the United States. His apparent thesis is that the only "Legal Tender Dollars" are those which contain a mixture of gold and silver and that only those dollars may be constitutionally taxed. This contention is clearly frivolous. See Koll v. Wayzata State Bank, 397 F.2d 124 (8th Cir. 1968).

[5] Defendant's fifth contention is that his criminal prosecution is illegal because it was not preceded by some form of administrative action. Defendant cites no apposite authority for this proposition. We are unable to discover

any authority to support this proposition.

The judgment appealed from is affirmed.